Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

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SAVED BY THE BELL—DESPITE POOR PLEADINGS, WESTERN DISTRICT OF TEXAS FINDS FIRST PARTY PLAINTIFF ENTITLED TO ATTORNEY'S FEES AND STATUTORY INTEREST UNDER FEDERAL RULE 54

Last week, the United States District Court for the Western District of Texas, San Antonio Division, addressed the issue of statutory attorney's fees and interest in *Agredano v. State Farm Lloyd's*, No. SA-15-CV-01067-RCL, 2018 WL 3579484 (W.D. Tex. Jul. 25, 2018) (slip. op.). In the underlying suit, Plaintiffs prevailed at trial on their claims of breach of contract and violations of the Texas Insurance Code. Accordingly, the issue before the appellate court was whether Plaintiffs were entitled to attorney's fees and statutory interest under Chapter 38 of the Civil Practice and Remedies Code and Section 542.060 of the Texas Insurance Code.

First, the Court noted that Chapter 38 provides that a person may recover attorney's fees from an individual or corporation under a contract claim. The Court quickly rejected Plaintiffs' claim under this chapter as the defendant, a Lloyd's plan, was an unincorporated entity and therefore fell outside of this section.

Next, the Court considered whether Plaintiffs were entitled to attorney's fees under Section 542.060 of the Texas Insurance Code, providing for remedies for an insurer's violations of the underlying policy. The Texas Prompt Payment of Claims Act provides an insurer who is liable under a policy and fails to promptly respond or pay a claim must pay an additional 18% per annum and attorney's fees. Recognizing that the jury found State Farm breached the contract with Plaintiffs in that Plaintiffs made a meritorious claim with State Farm who did not pay the claim, the Court found that Plaintiffs satisfied the substantive requirements of Section 542.060. Nonetheless, Plaintiffs' pleadings failed to make specific claims or request relief under the Prompt Payment of Claims Act (including 542.060).

Despite the omission from Plaintiffs' pleadings, the Court found Plaintiffs' motion for attorney's fees and interest was saved by Federal Rule of Procedure 54(c) providing "[e]very final judgment should grant the relief to which each party is entitled, *even if the party has not demanded that relief in its pleadings.*" Because the fees and interest in Section 542.060 are an automatic penalty and therefore an aspect of damages rather than a cause of action, they constitute "relief". Although Plaintiffs did not precisely demand relief, because they substantively complied with Section 542.060, the Court concluded that Plaintiffs were entitled to relief.

Lastly, State Farm argued that Plaintiffs were not entitled to relief under 542.060 since Plaintiffs failed to submit a proper written notice of their claim as required. The Court noted that, although Plaintiffs' original claim was not in writing, they provided a letter of representation to their claims representative which was enough for State Farm to apprise of the facts relating to the claim—including a damage estimate prepared by a third party. The Court therefore rejected Defendant's argument and found Plaintiffs entitled to interest at 18% per annum and attorney's fees.

FOURTEENTH COURT OF APPEALS OVERTURNS DENIED ABATEMENT FOR FAILURE TO PROVIDE SUFFICIENT PRESUIT NOTICE

Last week, the Fourteenth Court of Appeals in Houston, Texas, conditionally granted a writ of mandamus and overturned the trial court's denied abatement in *In re Allstate Indemnity Co.*, No. 14-18-00362, 2018 WL 3580644 (Tex. App.—Houston [14th Dist.], Jul. 26, 2018) (mem. op.). The underlying case was a first party action where Holly Holt and David Cabrera sued Allstate for disputed amounts relating to damage to their condominium from Hurricane Harvey. Plaintiffs' suit included causes of action for breach of contract, fraud, violations of the DTPA and Chapter 541 of the Texas Insurance Code. Allstate filed a plea in abatement claiming Plaintiffs failed to provide pre-suit written notice in accordance with the Texas Insurance Code. In response, Plaintiffs alleged they provided adequate notice and requested attorney's fees and sanctions for having to respond to the plea. The trial court denied Allstate's plea and awarded Plaintiffs $2,500 in attorney's fees. Allstate filed a petition for writ of mandamus asserting the trial court abused its discretion in denying the plea and assessing sanctions.

The Court of Appeals noted that Texas Insurance Code Section 542A requires the claimant, no later than the 61st day before the date a claimant files an action under the chapter, to give written notice providing: (1) a statement of the acts or omissions giving rise to the claim; (2) the specific amount alleged to be owed by the insurer; and (3) the amount of reasonable and necessary attorney's fees incurred by the claimant. Reviewing Plaintiffs' letter and emails they alleged constituted notice to Allstate, the Court concluded that the writings failed to comply with Section 542A. Accordingly, the Court concluded that the trial court abused its discretion in denying Allstate's plea in abatement and therefore the assessed sanctions were unsupportable.

SAN ANTONIO COURT OF APPEALS FINDS DUTY TO DEFEND—EVEN WHEN ALLEGATIONS ARE FALSE OR FRAUDULENT

Last week, the Fourth Court of Appeals in San Antonio, Texas, addressed an insurer's duty to defend when faced with false or fraudulent claims against the insured. In *Avalos v. Loya Insurance Co.*, No. 04-17-00070, 2018 WL 3551260 (Tex. App.—San Antonio, Jul. 25, 2016) (mem. op.), Plaintiffs appealed from the trial court's summary judgment in favor of Loya for claims of negligence, breach of contract, breach of duty of good faith and fair dealing and DTPA violations. The underlying suit stemmed from a car accident between Osbaldo Hurtado Avalos and Antonio Hurtado in one vehicle with Karla Flores Guevara and Rodolfo Flores in another. Flores was moving Guevara's car when he struck the Hurtados. Guevara was insured by Loya, however, the policy listed Flores as an excluded driver. Guevara, Flores and the Hurtados reported to the police and insurance company that Guevara (not Flores) was driving the involved vehicle. The Hurtados sued Guevara and through discovery, Guevara's counsel discovered that Flores, not Guevara, was driving at the time of the accident. Accordingly, Loya denied coverage and Guevara's counsel withdrew. A judgment was rendered against Guevara for over $450,000. Thereafter, the Hurtados, as assignees of Guevara, brought the underlying suit against Loya for actions including negligence, breach of contract, breach of the duty of good faith, and violation of the DTPA. Loya moved for both a traditional and no-evidence motion for summary judgment on the basis it had no duty to defend or cover Guevara as Flores was driving the vehicle, that there was no evidence Loya had a duty to defend Guevara or that Guevara was covered, and there was therefore no evidence as to the assigned claims brought by the Hurtados. Loya included portions of Guevara's deposition taken in the instant suit, where Guevara admitted Flores was driving the car. The trial court granted summary judgment for Loya and the Hurtado's appealed.

Analyzing Loya's duty to defend, the court employed the eight-corner rule—that only the insurance policy and the pleadings are relevant to the court's determination of the duty. Under the Hurtado's pleadings in the original negligence suit against Guevara, it is undisputed Guevara was a named insured under the policy, the vehicle involved was listed and that Flores was an excluded driver. Although Loya pointed to Guevara's deposition where she admitted she was not driving the vehicle at the time of the accident, the Court concluded that it was Loya's duty to establish the facts in defense of Guevara in the underlying suit—even if the allegations against Guevara were false or fraudulent. Accordingly, Guevara's deposition could not be considered—and because Loya had a duty to defend Guevara, the trial court erred in granting Loya's summary judgment. The Court reversed and remanded the case to the trial court.